

01316

DECISION



A. Z. neomed
Proc II
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-186930, B-187146

DATE: November 18, 1976

MATTER OF: Neomed, Inc.

DIGEST:

1. Agency request for best and final offers after revising RFP warranty clause to limit its application for a selected group of items in conformance with initial proposal of one offeror was proper.
2. Cancellation of RFP after receipt of best and final offers was reasonable exercise of procurement judgment when it was discovered that contracting officer had advised one offeror that another offeror was low after initial proposals had been received.

Neomed, Inc. protests the decision of Andrews Air Force Base (Air Force) to cancel RFP F49642-76-00063, and to award its requirement for portable solid state electrosurgical apparatus under IFB F49642-76-00116, to the low bidder, Birtcher Corporation. Award was made while the protest was pending upon the Air Force's determination that delivery of medically required items would be unduly delayed by failure to make prompt award, as authorized under Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3) (ii) (1975 ed.). Neomed contends that the resolicitation was improper since an award should have been made to Neomed under the cancelled RFP.

A total of 125 units were required, at a Government estimated total cost of \$300,000. The initial proposal resulted in the following offers:

Neomed, Inc.	\$1,334.00 per unit
Birtcher Corp.	\$1,666.74 per unit
Valleylab, Inc.	\$2,302.05 per unit

All prices were below the Government estimate. The RFP indicated that price would be treated as the determinative factor in making award.

B-186930

B-187146

Neomed was advised that it was the apparent low offeror and was asked to verify its unit price and submit a performance history. Although the Air Force states that it intended to proceed with award, award was not made because it was discovered "that Neomed had qualified its proposal" by excluding accessory items from its warranty. The contracting officer was then advised by the requiring activity that it was not necessary to include the accessories under the warranty, and as a result, best and final offers were requested from the two offerors considered to be within the competitive range. Birtcher submitted a best and final offer of \$1,320 per unit--\$14 per unit below the Neomed price, which remained fixed. It was later discovered that shortly after the receipt of the initial offer, the contracting officer had informed Birtcher that Neomed was the apparent low offeror. On discovery of this fact, the Air Force determined that the solicitation should be cancelled, and the procurement resolicited inasmuch as the negotiations had been compromised.

The Air Force explains that it:

"cancelled the subject RFP because failure to do so would have given validity to what in effect became an auction; Birtcher lowered its price after being informed Neomed's bid was low, Neomed subsequently attempted to lower its bid * * * after discovering Birtcher's price. ASPR 3-805.3 provides that 'auction techniques are strictly prohibited' because of the damage such techniques would incur on the integrity of the competitive system."

It cites our decision in Swedlow, Inc., 53 Comp. Gen. 564 (1974); 74-1 CPD 55, in which we indicated that a contracting officer acted properly in cancelling an RFP and resoliciting the procurement under an IFB after learning of a price leak prior to the beginning of the second round of negotiations.

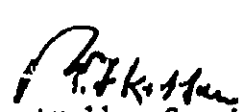
In our view, the applicability of the Swedlow rule is limited to those cases, like Swedlow, where the price leak occurred under circumstances in which it would be inappropriate to make award without further price negotiations. As indicated by the facts in Swedlow, and in this case, the contracting officer made the best of an unfortunate situation.

B-186930
B-187146

While rigid rules of bid responsiveness do not apply to a negotiated procurement, we agree with the Air Force that award of a negotiated contract without discussion is appropriate only where the proposal to be accepted offers to meet the Government's minimum needs as stated in the RFP. In this connection, we believe that it was entirely proper to request best and final offers on the basis of the modified warranty provision so as to place all offerors on the same footing. Moreover, in view of the contracting officer's disclosure to Birtcher that Neomed's price was low, we believe that the agency acted properly in cancelling the RFP. As we stated in Swedlow, Inc., 53 Comp. Gen. 139 (1973):

"While it is regrettable that Swedlow's price was leaked during the course of negotiations, the contracting officer had reason not to continue negotiations when to do so would have subjected the procurement process to charges of further irregularity and auction techniques. Though it may be argued, with some merit, that the prejudice to Swedlow outweighed the advantages of cancellation and resolicitation on a formal competitive basis, we cannot say on the record before us that the course of action followed did not represent a reasoned exercise of procurement judgment.* * *"

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States